Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-996

JOHN McCLURE SNOOK,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No. _____

JOHN McCLURE SNOOK,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgement herein of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on November 10, 1971, petition for rehearing denied on December 1, 1971.

OPINION BELOW

The opinion of the District Court was not reported. The opinion of the Court of Appeals is not yet reported. It reversed a judgement, entered on a directed verdict, authorizing a refund to petitioner of $2,149.12, together with statutory interest of $718.79, previously paid as excise taxes on the making and transfer of certain firearms.

JURISDICTION

The judgement of the United States Court of Appeals was rendered and entered on November 10, 1971, petition for rehearing denied on December 1, 1971. Jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED

1. Did the Court below err in holding that petitioner was not exempt from tax as a peace officer, within the meaning of 26 U. S. C. Sections 5812 (a) (2) and 5821 (b) (3) (B), as amended through August 16, 1954, and September 2, 1958, respectively, while never the less holding that petitioner was indeed a peace officer under both Alabama and federal law?

2. Are the making and transfer tax provisions of the National Firearms Act unconstitutional?

STATUTE INVOLVED

The statute involved is the National Firearms Act, 26 U. S. C. Section 5801, et seq., as amended through September 2, 1958. The relevant provisions are 26 U. S. C. Sections 5811, 5812 and 5821. Because these provisions are lengthy, their pertinent text is set forth as Appendix C, page 20

STATEMENT OF THE CASE

This petition for a writ of certiorari involves a suit brought by the petitioner in the District Court for the Southern District of Alabama, for the refund of $2,149.12, paid by him in 1965

as federal excise taxes upon the transfer and making of firearms which were in his possession in 1962. (R. 5 - 6) On January 5, 1971, the case was tried before a jury. (R. 2) At the close of the evidence, both the government and the petitioner moved for a directed verdict. (R. 28 - 30) The District Court denied the government's motion for a directed verdict and granted the petitioner's motion for a directed verdict. (R. 124 - 125) Its orders to that effect were entered on January 5, 1971 and January 12, 1971. (R. 31 - 34) The government filed a notice of appeal on March 5, 1971. On November 10, 1971, the Circuit Court reversed the District Court and remanded the case to the District Court for a directed verdict for the government.

The petitioner is employed by the Gulf Telephone Company in Foley, Alabama. He is a part-owner of the company and has served as general manager and vice-president. (R. 85, 105 - 106) The petitioner acquired the automatic weapons taxed by the government over a period of several years. (R. 106, 121)

In 1962, the petitioner had in his possession the following automatic weapons (R. 11) : two Schmeisser sub-machine guns (R. 106 - 107), two U. S. Carbines, Model M-1 (R. 108 - 109), one H & R Reising automatic rifle (R. 107 - 108), one Thompson sub-machine gun (R. 109 - 110), and two Savage Action .22 caliber sub-machine guns. (R. 110) The petitioner acquired the guns through various purchases and finds, and personally rehabilitated or converted them so that they were all in working condition and fully automatic. (R. 106 - 110) On July 29, 1964, these weapons were forfeited to the government under a condemnation order issued by the United States District Court for the Southern District of Alabama. The condemnation order was in substance an agreement between the parties that the weapons described therein should be forfeited. No plenary hearing of the matter was ever had. The District Judge

merely formalized the agreement of the parties through his order of condemnation. The very same district judge directed a verdict in favor of the petitioner in the instant case.

The government subsequently assessed a deficiency in excise taxes due upon the making and transfer of the above-described firearms under 26 U. S. C. Sections 5811 and 5821, as amended through September 2, 1958. The petitioner paid the assessed deficiency and then brought suit for a refund in the said District Court. The only grounds for a refund pertinent to this petition are that: the petitioner was a legally appointed deputy sheriff of Baldwin County, Alabama and a peace officer within the exemptions from tax granted by 26 U. S. C. Sections 5812 (a) (2) and 5821 (b) (3).(B) ; and that the National Firearms Act is unconstitutional.

In 1955, Sheriff Taylor Wilkins appointed the petitioner a Deputy Sheriff in the Sheriff's Department of Baldwin County. (R. 39) As Sheriff Wilkins pointed out at the trial, Baldwin County is the largest county in the state, has a land area of approximately 1,500,000 acres and has only six full-time deputies. (R. 39) Sheriff Wilkins's testimony at the trial was unequivocal. His volunteer deputies accompany regular deputies on patrol (R. 40), serve process (R. 41), accompany regular deputies in the transportation of prisoners (R. 41), search for missing persons (R. 41) and attend county police schools (R. 41). Sheriff Wilkins's opinion of his volunteer deputies is best stated in his own words:

> "We get a few fees in to buy cars and hire people. We go as far as we can with that. We ask the auxiliary people and they get out and do this work for us. It is a great help to us. In fact, we couldn't carry on our work without it." (R. 41 - 42)

Sheriff Wilkins testified that the petitioner in particular assisted in the evacuation of lowlands, furnished his telephone company vehicles for the removal of fallen trees from public roads, kept criminal suspects under surveillance, distributed ballot boxes on election days, made his telephone company's equipment and personnel available for dispatching duties, and made a telephone company warehouse available as a branch office for the Sheriff's Department.

In summary, Sheriff Wilkins gave the following approbation to the petitioner's performance as a deputy:

> "We like for them [volunteer deputies] to work at different times and we feel embarrassed at times to call on them so much, because we feel like they have a duty to their business and family. We do call on them a great deal and they do respond and especially Mr. Snook and a few in his area have responded very well and have done a lot of work for my department." (R. 47)

FEDERAL JURISDICTION IN THE DISTRICT COURT

The basis for federal jurisdiction in the District Court was Section 1346 (a) (1) of the Judicial Code of the United States.

REASONS FOR GRANTING THE WRIT

I.

In holding that petitioner was not exempt from tax as a peace officer, within the meaning of 26 U. S. C. Sections 5812 (a) (2) and 5821 (b) (3) (B), as amended through August 16, 1954 and September 2, 1958, respectively, while never the less holding that petitioner was indeed a peace officer under both

Alabama and federal law, the Circuit Court has decided a question of first impression under the National Firearms Act, and further, has decided an important law enforcement question in conflict with state law, while purporting to apply state law.

The Circuit Court itself pointed out, citing cases from petitioner's brief with approval, that:

> Under Alabama law, a sheriff has virtually unlimited discretion to select and appoint deputies on a fee basis. Code of Alabama, Title 54, Section 3. And the courts of Alabama have consistently upheld the authority of all types of deputies against challenges to their being "officers of the state." *Andrews v. Alabama*, 1885, 78 Ala. 483: *Floyd v. Alabama*, 1885, 79 Ala. 39 (a third person cannot collaterally attack the authority of such officer); *Pentecost v. Alabama*, 1894, 107 Ala. 81, 18 So. 146 (deputization need not be formal). Thus, we think the distinguished Alabama Federal District Judge was correct in holding Taxpayer to be a peace officer under Alabama law. In the structure of the Act, who is a peace officer has to be determined by reference to state law for tax act purposes. (Opinion of the Circuit Court, p. 4, fn. 5)

Petitioner urges that this legal conclusion was sufficient ground for affirming petitioner's exempt status as a peace officer.

II.

The Making and Transfer Tax provisions of the National Firearms Act are unconstitutional.

The Circuit Court ignored the unconstitutionality and inequity of the ". . .federal way of dealing with the use of gangster weapons in organized crime." (opinion of the Circuit Court, at p. 3) While the Circuit Court conceded that petitioner was only an "innocent" violator and not within the intendment of the taxing statute, it ignored the insidious use of the national taxing power to accomplish a purpose extrinsic to the collection of revenue. See *Haynes v. United States*, 390 U. S. 85 (1968) and *United States v. Freed*, 401 U. S. 601 (1971), reh. den., 403 U. S. 912 (1971). Also the Circuit Court ignored the unjust enrichment inuring to the government by way of the unconstitutional condemnation of the weapons the subject of taxation in this proceeding, *United States v. U. S. Coin & Currency*, 401 U. S. 715 (1971).

In *Haynes v. United States*, 390 U. S. 85 (1968), the Supreme Court held that the registration provision of 26 U. S. C. Section 5841 and the illegal possession provisions of 26 U. S. C. Section 5851 were unconstitutional in the face of a timely made claim of the privilege against self-incrimination. See also *Marchetti v. United States*, 390 U. S. 39 (1968), and *Grosso v. United States*, 390 U. S. 62 (1968), which held wagering taxes subject to similar constitutional infirmities.

In all three of these cases, the question of whether or not the civil revenue provisions underlying the prosecutions were valid was left open. The Court stated that Congress has the power to tax illegal activities, but the Court refused to pass on the appropriateness of the particular taxes in question. Petitioner urges that the Court do so in the instant case. The recently decided case of *United States v. U. S. Coin & Currency*, 401 U. S. 715 (1971), indicates that *Marchetti* and *Grosso* do have a civil field of operation.

Other cases indicating that *Marchetti* and *Grosso* have a civil field of operation are *United States v. $125,882 in U. S. Currency*, 286 F. Supp. 643, 645 (S. D. N. Y. 1968).

(*Marchetti* and *Grosso* make for an abatement of pending wagering tax proceedings), *United States v. One Philco Television*, 292 F. Supp. 35 (S. D. Tex. 1968), aff'd; 443 F. 2d 369 (5th Cir. 1971), *United States v. Riccio*, 232 F. Supp. 982 (N. D. Ill. 1968), and *United States v. $3,296.00 in Currency*, 280 F. Supp. 547 (N. D. N. Y. 1968).

It is especially pertinent to note that the entire statutory framework of 26 U. S. C. Section 5801 - 5872 was modified subsequent to the *Haynes* decision. Pub. L. No. 90 - 618, Title II, Section 201 (Oct. 22, 1968). Note especially 26 U. S. C. Section 5848, which seeks to ameliorate self-incriminating aspects of the statute. The legislative history indicates a direct congressional response to *Haynes*. See 1968 U. S. Code Cong. and Adm. News, p. 4435.

Suffice it to say that such legislation was, of course, not in force at the pertinent times in the instant case. Rather the very statutory framework attacked by *Haynes* was in full force and effect. Just as *Marchetti* and *Grosso* were applied in a civil context to nullify forfeitures of money and property, so *Haynes* should be applied to nullify the civil liability imposed in the instant case.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgement of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1838
Summary Calendar*

JOHN McCLURE SNOOK,
Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Alabama

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(November 10, 1971)

Before BROWN, Chief Judge, INGRAHAM and RONEY, Circuit Judges.

BROWN, Chief Judge: Despite the unfortunate understaffing of many local law enforcement agencies and the undeniable value of assistance rendered them by conscientious citizens, we hold that the voluntary participation of a private individual in an honorary

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*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409.

deputy sheriffs club does not automatically exempt that person from Federal excise taxes in the arming of a private quasi-militia with automatic rifles and sub-machine guns which are never used in performance of police functions. The District Court having thought otherwise and having directed a verdict to that effect, we accordingly reverse the decision below.

The evidence in the present case is clear and uncontroverted. Taxpayer was the president and part owner of a telephone company in Foley, Alabama.[1] Over the years he accumulated a rather formidable collection of automatic weapons.[2] Motivated in part by fear of a deterioration of the international situation and desiring to prepare local citizens to take a "defensive stand," he organized the company personnel into a "drill squad" and "shooting team" and conducted weekend training sessions and practice programs.

Indeed, what brought about Taxpayer's predicament was his skill as a weapons artificer in rehabilitation and conversion. Some of the weapons were in less than operational order when acquired, so Taxpayer personally rehabilitated and controverted them to automatic status. Meanwhile, he had completely ignored — perhaps he was not even aware of — the provisions

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[1]Foley, Alabama is situated in the largest county in the state. Baldwin County, of which Bay Minette is the county seat, encompasses approximately 1,500,000 acres of land and had a 1970 population of 58,193.

[2]Taxpayer had the following automatic weapons in his possession in 1962: two Schmeisser sub-machine guns, two modified U.S. Carbines, Model M-1, one H & R Reising automatic rifle, one Thompson sub-machine gun, and two Savage Action .22 caliber sub-machine guns.

of the Internal Revenue Code relating to transfer, alteration and registration of automatic weapons,[3] which, on a tax structure, was the federal way of dealing with the use of gangster weapons in organized crime. As a result of this non-compliance, the District Court for the Southern District of Alabama issued a condemnation order in a 1964 libel proceeding and the weapons were condemned to the United States. Subsequently, the Commissioner of Internal Revenue assessed a deficiency in excise taxes due upon the making and transfer of the firearms, and the Taxpayer, after having paid the deficiency, now sues for a refund.

The facts show the "making" of automatic weapons and the failure to comply with the reporting and tax requirements. Granting that Taxpayer was, like many citizens, caught by beneficent legislation aimed at quite a different group, his only escape from what is obviously an "innocent" violation of law lies in the "peace officer" exemption[4] to the statute. If he does

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[3]The relevant provisions of the Internal Revenue Code included §§ 5811, 5812, 5814, and 5821. These, in effect, provide for tax on transfer of automatic weapons; require Government order forms for transfer of these weapons, provide for tax on and declaration of the "manufacture, putting together [or] alteration" of such firearms, and exempt, *inter alia* "peace officers" from the requirements of the chapter.

[4]Section 5821(b)(3)(B) of the Internal Revenue Code of 1954, on which the Taxpayer relies, provides:

> "(b) Exceptions. — The tax imposed by subsection (a) shall not apply to the making of a firearm —
>
> (3) for the use of —
>
> (A) the United States Government, any State, Territory, or possession of the United States, any political subdivision thereof, or the District of Columbia, or

not have this exemption, he loses and he knows it.

The basis of Taxpayer's claim is that in 1962 and prior years, he carried a "special" or "auxiliary" deputy sheriff card issued by the Sheriff of Baldwin County, Alabama, and therefore, he came within the exemption. While we agree that Taxpayer was a "peace officer" under Alabama and thus necessarily under Federal law,[5] we interpret the statute to require more than mere status to trigger the protection exemptions of §5812 and §5821.

Though the statute in its *liberal* wording suggests no limitation to its broad grant to exclusion to "any peace officer," we think it takes no great prescience to perceive that Congress was legislating in terms of firearms bearing a sensible relationship to law enforcement activities. Indeed, in the confrontation of law enforcement officers with hoodlums, gangsters and or-

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(B) any peace officer or any Federal officer designated by regulations of the Secretary or his delegate."

Section 5812 of the Code provides a similar exemption from requirements relating to transfers of the subject firearms.

[5]Under Alabama law, a sheriff has virtually unlimited discretion to select and appoint deputies on a fee basis, Code of Alabama, Title 54, Section 3. And the courts of Alabama have consistently upheld the authority of all types of deputies against challenges to their being "officers of the state." Andrews v. Alabama, 1885, 78 Ala. 483; Floyd v. Alabama, 1885, 79 Ala. 39 (a third person cannot collaterally attack the authority of such officer); Pentecost v. Alabama, 1894, 107 Ala. 81, 18 So. 146 (deputization need not be formal). Thus, we think the distinguished Alabama Federal District Judge was correct in holding Taxpayer to be a peace officer under Alabama law. In the structure of the Act, who is a peace officer has to be determined by reference to state law for tax act purposes. Cf. Lehman v. U.S., 5 Cir. 1971, ____ F.2d ____ [No. 71-1709].

ganized criminals, Congress did not intend to afford law enforcement officials less of an arsenal than the adversary.

Thus it seems clear that the purpose of the National Firearms Act was to make more difficult and controlled the acquisition of certain types of weapons "likely to be used by the gangster element."[6] The Act sought to make law enforcement work easier and safer by restricting the availability of highly dangerous weapons. This interpretation of the purpose of the provisions in question is bolstered by language in the Report of the House Committee on Ways and Means accompanying H.R. 9741, 73rd Cong., 2d Sess., Rep't No. 1780: "While there is justification for permitting the citizen to keep a pistol or revolver for his own protection without any restriction, there is no reason why anyone except a law officer should have a machine gun or sawed-off shot gun."

Moreover, although we have been unable to find any legislative history directly relating to the exemption in question, the purpose of that provision seems equally apparent — sometimes law officers may need sophisticated weaponry for their own protection or for subduing the quarry in the investigation and apprehension of criminals. Thus, while desiring to make acquisition of dangerous weapons more difficult and supervised generally Congress did not wish to handcuff law enforcement agents engaged in legitimate criminal in-

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[6] 1960 U.S. Code Cong. & Admin. News 2112. See also, Haynes v. United States, 1968, 390 U.S. 85, 87 n.4, 88 S.Ct. 722, ____, 19 L.Ed.2d 923, 927.

vestigations, as "peace officers" under state law.[7]

Applying that understanding to the facts of the instant case, it is apparent that Taxpayer's possession of the weapons in question was contrary to the specific purpose for which the Act was passed (namely, to reduce the number of sub-machine guns, sawed-off shotguns and similar dangerous armaments generally available) and in no way furthered the purpose of the exemption — to aid law enforcement efforts legitimately requiring automatic weapons for safety or effectiveness.

In this case, the record establishes positively that the weapons in Taxpayer's possession were acquired and used by him in a purely private capacity and were in no way required by or related to his actual activities as a special auxiliary deputy sheriff. The firearms were initially acquired as a personal weapons collection. Subsequently, Taxpayer used them to organize a quasi-militia or drill team among a number of employees of his telephone company. He then directed this group in conducting a drilling and shooting program at a local high school. The weapons were displayed and demonstrated at various programs, drills, parades and ceremonies, but, as the Sheriff testified,

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[7]Apparently administrative difficulties led Congress to conclude that leaving it wholly to the states was unworkable. To cut off the thousands of badge bearers from one kind of courtesy V.I.P. commission or another, Congress changed the wording of the relevant section in 1968 to read that the exemption applies to only "official police organizations • • • engaged in criminal investigations." Section 5853 of the 1954 Code as amended by Section 201, National Firearms Act Amendment of 1968, P.L. 90-618, 82 Stat. 1213, 1227.

these were not official functions of the Sheriff's Department, nor activities in which Taxpayer was performing acts as a peace officer. The weapons in question were not used in the pursuit of any law enforcement activites.

Granting full credit to Taxpayer's valuable assistance to the full-time constabulary, his services never came close to requiring the use of or the need for these weapons. Among the services provided by Taxpayer were furnishing telephone company vehicles for the removal of fallen trees from public roads, keeping criminal suspects under surveillance, distributing ballot boxes on election day, directing traffic around accidents, evacuating people and clearing roads during a hurricane, looking out for vandalism on Halloween and assisting with ticket sales at the county fair. Surely these activities, while commendable and an important quasi-public service, did not require — or ever call for — the use of five sub-machine guns and three automatic rifles.

If we were to adopt the reasoning of the Taxpayer here, that merely being a card-carrying member of any organization which supports local law enforcement activities or simply being qualified under state law as a "deputy" by the local sheriff avoids requirements of the Act, the purpose for which the Act was passed would be completely undermined as law enforcement officers contemplate the prospect of facing a levy en

masse from a body of local citizens armed with such fire power.[8]

We are left then with a case in which to construe the statute literally leads to results which Congress sought to prohibit. We choose to read it sensibly to apply only where the possession, transfer or making of automatic weapons is related to the use or need for use by the law enforcement activities of the person seeking the exemption. Status alone is not enough to invoke the immunizing shield — some actual relationship between possession of the weapons and legitimate law enforcement activities must be shown.

We do not mean to discount or in any way demean the wonderful work done by volunteer organizations such as the one to which Taxpayer belonged. But to hold that such status alone entitled them to exemption from Internal Revenue Code provisions regulating the manufacture and transfer of automatic weapons simply ignores what Congress meant to do by the National Firearms Act.

Of the facts and inferences in this case there can be no doubt. The Trial Court's error was in misapprehending the *legal* implication, not in mistaking the facts. Thus, since all the evidence points so strongly and so overwhelmingly to factual conclusions on which reasonable men could not fail to agree, and those find-

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[8]In fact, there were more than 400 persons engaged in law enforcement support or belonging to "auxiliary" sheriffs clubs in the Foley area in 1962. In addition to the organization to which Taxpayer belonged, there was a Sheriff's Mounted Posse and a Sheriff's Flotilla (an organization of boat owners).

ings lead inexorably to the legal conclusion that Taxpayer was not entitled to the desired exemption merely because of his status as a peace officer, a directed verdict for the Government would have been in order, and should have been granted. *Boeing Co. v. Shipman*, 5 Cir., 1969, 411 F.2d 365 (en banc).

REVERSED and REMANDED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1838
Summary Calendar*

D. C. Docket No. 5272–68

Before BROWN, Chief Judge, INGRAHAM and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgement of the said District in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

November 10, 1971

Issued as Mandate: Dec. 8, 1971

APPENDIX C

Internal Revenue Code of 1954 (26 U. S. C.) :

SEC. 5811 [as amended by Sec. 2, Act of June 1, 1960, P. L. 86 - 478, 74 Stat. 149]. TAX.

(a) Rate - There shall be levied, collected, and paid on firearms transferred in the United States a tax at the rate of $200 for each firearm: Provided, that the transfer tax on any gun with combination shotgun and rifle barrels, 12 inches or more but less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and on any gun classified as "any other weapon" under Section 5848 (5), shall be at the rate of $5. The tax imposed by this section shall be in addition to any import duty imposed on such firearm.

SEC. 5812 [as enacted August 16, 1954, 68A Stat. 722] EXEMPTIONS.

(a) Transfers exempt - This chapter shall not apply to the transfer of firearms --

(1) to the United States Government, any State, Territory, or possession of the United States, or to any political subdivision thereof, or to the District of Columbia;

(2) to any peace officer or any Federal officer designated by regulations of the Secretary or his delegate;

(3) to the transfer of any firearm which is unserviceable and which is transferred as a curiosity or ornament.

(b) Notice of exemption - If the transfer of a firearm is exempted as provided in subsection (a), the person transferring such firearm shall notify the Secretary or his delegate of the name and address of the applicant, the number or other mark identifying such firearm, and the date of its transfer, and shall file with the Secretary or his delegate

such documents in proof thereof as the Secretary or his delegate may by regulations prescribe.

SEC. 5821 [as amended by Sec. 203 (d), Excise Tax Technical Changes Act of 1958, P. L. 85 - 859, 72 Stat. 1275]. RATE, EXCEPTIONS, ETC.

(a) Rate - There shall be levied, collected, and paid upon the making in the United States of any firearm (whether by manufacture, putting together, alteration, any combination thereof, or otherwise) a tax at the rate of $200 for each firearm so made.

(b) Exceptions - The tax imposed by subsection (a) shall not apply to the making of a firearm -

(1) by any person who is engaged within the United States in the business of manufacturing firearms;

(2) from another firearm with respect to which a tax has been paid, prior to such making, under subsection (a) of this section; or

(3) for the use of -

(A) the United States Government, any State, Territory, or possession of the United States, any political subdivision thereof, or the District of Columbia, or

(B) any peace officer or any Federal officer designated by regulations of the Secretary or his delegate.

Any person who makes a firearm in respect of which the tax imposed by subsection (a) does not apply by reason of the preceding sentence shall make such report in respect thereof as the Secretary or his delegate may by regulations prescribe.

(c) By-whom paid; when paid - The tax imposed by sub-

section (a) shall be paid by the person making the firearm. Such tax shall be paid in advance of the making of the firearm.

(d) How paid - Payment of the tax imposed by subsection (a) shall be represented by appropriate stamps to be provided by the Secretary or his delegate.

(e) Declaration - It shall be unlawful for any person subject to the tax imposed by subsection (a) to make a firearm unless, prior to such making, he has declared in writing his intention to make a firearm, has affixed the stamp described in subsection (d) to the original of such declaration, and has filed such original and a copy thereof. The declaration required by the preceding sentence shall be filed at such place, and shall be in such form and contain such information, as the Secretary or his delegate may by regulations prescribe. The original of the declaration, with the stamp affixed, shall be returned to the person making the declaration. If the person making the declaration is an individual, there shall be included as part of the declaration the fingerprints and a photograph of such individual.

APPENDIX D

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1838

Summary Calendar*

JOHN McCLURE SNOOK,

Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Alabama

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(December 1, 1971)

ON PETITION FOR REHEARING

Before BROWN, Chief Judge, INGRAHAM and RONEY, Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

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SUPREME COURT, U. S.
FILED
MAR 15 1972
MICHAEL RODAK, JR., CLERK

No. 71-996

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN McCLURE SNOOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-996

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OPINIONS BELOW.

The district court granted petitioner's motion for a directed verdict without filing an opinion. The opinion of the court of appeals (Pet. App. A 10–18) is reported at 451 F. 2d 329.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1971 (Pet. App. B 19). A petition for rehearing was denied on December 1, 1971 (Pet. App. D 23). The petition for a writ of certiorari was filed on February 4, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was a "peace officer" within the meaning of Sections 5812(a)(2) and 5821(b)(3)(B) of the Internal Revenue Code of 1954 (prior to their amendment by the Gun Control Act of 1968), and therefore was exempt from the excise taxes imposed by Sections 5811(a) and 5821(a) on the transfer and making of certain firearms.

STATUTE INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 are set forth in Appendix C to the petition (Pet. App. C 20–22).

STATEMENT

Petitioner was the president and a part owner of a telephone company in Foley, Alabama. Over the years he accumulated a personal collection of automatic weapons which, in 1962, included five submachine guns and three automatic rifles. He rehabilitated weapons which were non-operational when he acquired them, and converted nonautomatic weapons to automatic operation. Having organized employees of his telephone company into a quasi-militia or drill team, he equipped them with his automatic weapons and conducted public drilling and shooting programs, sometimes in conjunction with parades and other ceremonies. (Pet. App. A 11, 15–16.)

In 1964, in a libel proceeding stemming from petitioner's failure to register his automatic firearms as required by provisions of the Internal Revenue Code, petitioner's weapons were forfeited to the United

States under an order of condemnation. Thereafter, the Commissioner asserted tax deficiencies against petitioner under Sections 5811(a) and 5821(a) of the Code, which impose excises on the making and transfer of automatic weapons. Petitioner paid the taxes in dispute and brought this suit for refund, claiming that he was exempt from the taxes as a "peace officer" within the meaning of Sections 5812(a)(2) and 5821(b)(3)(B). The basis of petitioner's claim is that in 1962 and prior years, he carried a "special" or "auxiliary" deputy sheriff card issued by the Sheriff of Baldwin County, Alabama. (Pet. App. A 11–13.)

Petitioner was one of more than 400 "auxiliary" deputy sheriffs in the Foley area in 1962. His voluntary assistance to the full-time constabulary included such services as furnishing his company's vehicles for removing fallen trees from public roads; keeping criminal suspects under surveillance, distributing ballot boxes on election day, directing traffic around accidents, evacuating people during a hurricane and assisting with ticket sales at the county fair. These activities did not require or call for the use of submachine guns and automatic rifles, and petitioner's automatic weapons were not used in the pursuit of any law enforcement activities, or even in any official functions of the Sheriff's Department. (Pet. App. A 15–17.)

At the close of the evidence in the jury trial below, the district court granted petitioner's motion for a directed verdict. The court of appeals reversed and remanded with directions to enter a verdict for the

government, holding (Pet. App. A 10–11) that "the voluntary participation of a private individual in an honorary deputy sheriffs club does not automatically exempt that person from Federal excise taxes in the arming of a private quasi-militia with automatic rifles and submachine guns which are never used in the performance of police functions." The court took the view that petitioner did have the status of a "peace officer" under Alabama law, and, by reason thereof, had the same status under Federal law—including the statutory provisions which, on their face, exempt a "peace officer" from the taxes involved. But the court held on the basis of the legislative history that Congress intended to exempt a "peace officer" from the taxes only when his possession of the weapons involved was sensibly related to law enforcement activities. On the facts of this case, the court ruled (Pet. App. A 15) that petitioner's possession of automatic weapons "in no way furthered the purpose of the exemption—to aid law enforcement efforts legitimately requiring automatic weapons for safety or effectiveness."

ARGUMENT

The decision below is correct. There is no conflict or any other reason for further review. Moreover, in the Gun Control Act of 1968, Congress eliminated the excise tax exemption previously accorded to "peace officers," and also substantially revised the statutory provisions relating to the making and transfer of gangster-type weapons.

I. The taxing provisions of Sections 5811 and 5821 of the 1954 Code are part of an interrelated statutory scheme for controlling dangerous weapons which originated in the National Firearms Act of June 26, 1934, c. 757, 48 Stat. 1236. Section 3(a) of the 1934 Act imposed a heavy tax on transfers of machine guns (defined in Section 1(b) as including all automatic weapons) and sawed-off shotguns. Other sections required registration of such weapons. Under Section 13, however, the requirements of the Act were inapplicable if the weapons were transferred to a federal or state agency or officer, including a "peace officer." The purposes of the Act were reflected in H. Rep. No. 1780, 73d Cong., 2d Sess., p. 1, as follows:

> The gangster as a law violator must be deprived of his most dangerous weapon, the machine gun. Your committee is of the opinion that limiting the bill to the taxing of sawed-off guns and machine guns is sufficient at this time. It is not thought necessary to go so far as to include pistols and revolvers and sporting arms. But while there is justification for permitting the citizen to keep a pistol or revolver for his own protection without any restriction, there is no reason why anyone except a law officer should have a machine gun or sawed-off shotgun.

In short, Congress intended to keep machine guns and sawed-off shotguns from the hands of criminals and even innocent private citizens, but to permit such weapons to be acquired by law enforcement officers who, alone, would have a legitimate and reasonable use for them. This Court has held that the sanctions

thus employed were not unconstitutional as a usurpation of the police powers reserved to the states. *United States* v. *Miller*, 307 U.S. 174.

The taxing provisions and exemptions of the National Firearms Act, later enlarged to include a tax on the making as well as on the transfer of weapons, were reflected in Sections 2720, *et seq.* of the Internal Revenue Code of 1939, and then carried over in Chapter 53 of the 1954 Code. The legislative history of the 1954 Code refers to the tax imposed on transfer by Section 5811 as a tax on "gangster-type" weapons, as opposed to "sporting-type" firearms. H. Rep. No. 1337, 83d Cong., 2d Sess., p. A393; S. Rep. No. 1622, 83d Cong., 2d Sess., p. 559. The exemption of "peace officers," together with other governmental authorities, was continued under Sections 5812(a)(2) and 5821(b)(3)(B). Treasury Regulations on Machine Guns and Certain Other Firearms (1954 Code), 26 C.F.R. 179.104 (Jan. 1, 1968 rev.) defines "peace officers" as: "Sheriffs, chiefs of police, commissioners of police, superintendents or other chief officers of State police units, State highway patrols, directors of public safety, and bona fide subordinate officers under the command of the aforementioned persons * * *."

As the court of appeals held, the foregoing history of the relevant taxing provisions demonstrates that Congress meant to exempt from tax only those "peace officers" who had a legitimate need and use for machine guns and sawed-off shotguns in the enforcement of the laws. The same result is reached if, as the government contended below, the term "peace officer"

is construed as applying only to police officers and the like who are, in fact, charged with law enforcement. Under either interpretation, petitioner would not qualify for the exemption since his making, acquisition and use of automatic weapons had nothing to do with his voluntary services as a "special" or "auxiliary" deputy sheriff.

The Fifth Circuit's reading of the exemption provisions, in any event, has no current administrative importance. In 1968 Congress amended the statute to limit the exemption from firearms taxes only to "official police organization[s] * * * engaged in criminal investigations." Section 5853 of the 1954 Code, as amended by Section 201, National Firearms Act Amendment of 1968, P.L. 90-618, 82 Stat. 1213, 1233. We know of no other pending cases involving the so-called "peace officer" exemption under the prior law.

2. Petitioner contends (Pet. 6–8) that the making and transfer tax provisions of Section 5811 and 5821 are unconstitutional, citing *Haynes* v. *United States*, 390 U.S. 85; *United States* v. *Freed*, 401 U.S. 601; *Marchetti* v. *United States*, 390 U.S. 39; *Grosso* v. *United States*, 390 U.S. 62; and *United States* v. *U.S. Coin & Currency*, 401 U.S. 715. These cases are distinguishable.

Only *Haynes* and *Freed* arose under the National Firearms Act. *Haynes* involved a prosecution under the provision of the pre-1968 version of Section 5851 making it unlawful to possess weapons that have not been registered as required by Section 5841. The Court there held (390 U.S. at 100) that "a proper claim

of the constitutional privilege against self-incrimination provides a full defense to prosecutions either for failure to register a firearm under § 5841 or for possession of an unregistered firearm under § 5851." This holding was based on the Court's finding that Section 5841 required registration of weapons only where the possessor had not met such prior statutory requirements as payment of the taxes due on the transfer and making of firearms. Therefore, registration under Section 5841 was necessarily and automatically a self-incriminating act on the part of the registrant. As the Court explained (390 U.S. at 96), "[t]he registration requirement is thus directed principally at those persons who have obtained possession of a firearm without complying with the Act's other requirements and who therefore are immediately threatened by criminal prosecutions under §§ 5851 and 5861. They are unmistakably persons inherently suspect of criminal activities." *Albertson* v. *SACB*, 382 U.S. 70, 79."

In the case at bar, petitioner has paid the taxes assessed by the Commissioner under Sections 5811 and 5821 on the transfer and making of weapons. He is in compliance with those provisions. And such compliance does not involve, as it did in *Haynes*, self-incrimination under other statutory provisions. Petitioner is not threatened with criminal prosecution by reason of the fact that he has paid his taxes. For this reason, *Haynes* is inapposite.

Furthermore, following the *Haynes* decision, Congress substantially revised the registration requirements of Section 5841 and allied provisions so that

only a possessor of firearms who lawfully makes, manufactures, or imports firearms can and must register them. Under the new provisions, a transferee does not and cannot register, though possession of an unregistered firearm is illegal. In *Freed* this Court rejected the claim that the revised registration requirements compelled self-incrimination in violation of the Fifth Amendment prohibition. The problem presented here thus is unlikely to arise in any other case.

Marchetti and *Grosso* likewise are not in point. They involved the federal wagering tax statutes, which require gamblers to register and pay occupational and excise taxes. Compliance with the statutory requirements did not exempt taxpayers from prosecution under federal and state laws which broadly proscribe wagering, and lists of those complying with the wagering statutes were furnished to prosecutors. Under these circumstances, this Court held that seasonable invocation of Fifth Amendment rights barred prosecution for violation of the wagering statutes. The situation in the instant case is significantly different; if the requirements of the National Firearms Act are met, possession of the weapons involved is not subject to criminal sanctions under any other law.

U.S. Coin & Currency is an extension of *Marchetti* and *Grosso*. The Court held in that case that the Fifth Amendment privilege against self-incrimination may be invoked to bar an action for the forfeiture of money in the possession of a gambler, based on the gambler's failure to register and pay the wagering tax, since

the forfeiture statutes "are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise." *U.S. Coin & Currency, supra,* 401 U.S. at 721–722. The instant case is not a forfeiture proceeding and, as noted above, possession of automatic weapons is not criminal if the requirements of the National Firearms Act are satisfied.[1]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[1] Although petitioner's weapons were condemned in a 1964 forfeiture proceeding, this was for failure to comply with the requirements of the National Firearms Act—chiefly, registration requirements—and not because petitioner was engaged in activities that were otherwise unlawful. At all events, the forfeiture of petitioner's weapons is not before this Court. The only question is whether petitioner is liable for the excises imposed on the transfer and making of automatic weapons.

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